Supreme Court, U. S.
FILED
SEP 7 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1977

77-366

BLINDER ROBINSON & COMPANY, INC.,

Petitioner,

vs.

HALPERT OBERST & COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

IRWIN S. LAMPERT
Attorney for Petitioner
252 Main Street
Goshen, New York 10924
(914) 294-8811

096 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 840-9494 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Issues Involved	2
Preliminary Statement	2
Reasons For Granting the Writ	4
Conclusion	5

TABLE OF CITATIONS

Cases Cited:

Bellows v. Porter, 104 F. Supp. 648	5
Brown v. Financial Services Corp., 489 F.2d 144	5
Kilpatric Bros. v. IBM Corp., 464 F.2d 1080	5
Orient Mid-East Liner v. Albert E. Bowen, Inc., 458 F.2d 572 (2d Cir. 1972)	3
Volkenburg K-G v. The S.S. Henry Denny, 295 F.2d 330 (7th Cir. 1961)	3
Western Machinery v. Northwestern Import Co., 254 F.2d 453	5

Contents

Page

Statute Cited:

28 U.S.C. §1254(1) 2

Other Authorities Cited:

3 AM Jur 2d, Agency, §317 (1962) 3

2 Williston on Contracts, §288 (3rd ed. 1959) 3

Restatement of Agency 2d §320, comment b (1958) 4

APPENDIX

Appendix A — Opinion of the United States Court of Appeals 6

Appendix B — Opinion of the United States District Court . 8

In The

Supreme Court of the United States

October Term, 1977

BLINDER, ROBINSON & COMPANY, INC.,

Petitioner,

vs.

HALPERT OBERST & CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Blinder, Robinson and Company petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the District Court (Docket #76-2387).

The judgment affirmed the District Court's decision finding a binding contract between the petitioner and respondent after a trial without jury (Civil Action 75-363 L.A.W.).

OPINIONS BELOW

The opinion of the Court of Appeals is set forth as Appendix A.

The opinion of the District Court is set forth as Appendix B.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Court of Appeals is authorized by 28 U.S.C. §1254(1).

ISSUES INVOLVED

1. Did the Court of Appeals err, when it failed to find that an agreement on file with the National Association of Securities Dealers was notice to a third party of the agency relationship between the parties?

2. Did the Court of Appeals err, when it permitted the introduction of parol evidence of prior or contemporaneous conversations to substitute a new and different contract for the one evidenced by a writing?

3. Did the Court of Appeals err when it found that the respondent had proved by a fair preponderance of evidence that it had entered into an agreement with the petitioner?

PRELIMINARY STATEMENT

The United States District Court based on the testimony of an employee of the respondent, contrary to an agreement on file with the National Association of Securities Dealers and contrary to the written confirmation of the respondent found the petitioner was a principal in the purchase of municipal bonds and liable for payment of said bonds to the respondent. The

Court of Appeals without permitting oral arguments affirmed the District Court's decision setting forth as the basis for its decision the reasons enumerated in the District Court's opinion.

The respondent's entire case was based on the testimony of one of its employees who testified that based on a conversation with an employee of the petitioner he believed the petitioner to be the principal. These facts were contrary to a written confirmation prepared by the respondent and to the fact that the respondent delivered the bonds and received payment from a third party. The payment received from the third party was returned unpaid and the respondent filed a claim against it in a subsequent insolvency proceedings.

The District Court in its opinion made the following conclusions of law:

> "Where a third party has no notice that an agent is acting for another, the principal is said to be undisclosed Restatement of Agency 2d, §§4, 322 (1958). An agent who executes a contract for an undisclosed principal becomes liable as a party to the contract. *Volkenburg, K-G v. the S.S. Henry Denny,* 295 F.2d 330 (7th Cir. 1961); 3 AM Jur 2d, *Agency,* §317 (1962).

In this regard it should be noted that the agent always has the duty of disclosure:

> . . . (T)he law does not impose a duty of an inquiry upon a person dealing with an agent of an undisclosed or partially disclosed principal.

Orient Mid-East Liner v. Albert E. Bowen, Inc., 458 F.2d 572, 577 (2d Cir. 1972); *2 Williston on Contracts,* §288 (3rd ed. 1959).

> Thus, in a contract action the plaintiff has the initial burden of showing that the defendant was a party to it. If, at the time of contracting, the defendant did not unambiguously indicate that it was acting in a representative capacity only, the burden of going forward with such evidence shifts to the defendant. *Restatement of Agency 2d,* §320, comment b (1958)."

The written evidence clearly and unambiguously showed that an agreement was on file with the National Association of Securities Dealers which set forth the relationship between the petitioner and its principal. These agreements are common in the industry and have been form of notice to those in the securities industry. Both the petitioner and the respondent are a part of that industry and aware of its workings.

The respondent invoiced, delivered and accepted payment from a third party. These acts are totally inconsistent with the findings that the petitioner was a undisclosed principal.

REASONS FOR GRANTING THE WRIT

The Court of Appeals in affirming the District Court's decision in effect negated the authority of the National Association of Securities Dealers to file clearing agreements as notice to the securities industry. These agreements have been filed for many years and has heretofore served as notice to all parties. The Court should resolve the matter as to whether such agreements will have any validity in the future especially in light of the fact that there are numerous such agreements on file today. The industry should be given an opportunity to properly advise its members as to existing law.

I further submit that this Court should grant the writ of certiorari to resolve the questions of whether parol evidence can be introduced to substitute a new, a different contract for the one

evidence by the writing. The courts have repeatedly held that a written instrument cannot be changed, explained or set aside by parol evidence. (*Western Machinery v. Northwestern Import Co.,* 254 F.2d 453; *Bellows v. Porter,* 104 F. Supp. 648; *Brown v. Financial Services Corp.,* 489 F.2d 144.)

In order for extrinsic evidence to be admitted there must be a showing of sham or mistake. *Kilpatric Bros. v. IBM Corp.,* 464 F.2d 1080. The respondent made no such allegations in the instant case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Irwin S. Lampert
Attorney for Petitioner

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2387

HALPERT OBERST & CO., a New Jersey Corporation,

v.

BLINDER, ROBINSON & COMPANY, a New York Corporation,

Appellant

Appeal from the United States District Court for the District of New Jersey
(D.C. Civil No. 76-363)

Submitted Under Third Circuit Rule 12(6)
June 9, 1977
Before: ALDISERT, ROSENN, HUNTER, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, and for the reasons set forth in the district court opinion by The Honorable Lawrence A. Whipple, No. 75-363 (D.N.J., filed July 28, 1976), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

s/ Aldisert
Circuit Judge

Attest:

s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

Dated: June 9, 1977

Certified as a true copy and issued in lieu of a formal mandate on July 1, 1977.

Test: Thomas F. Quinn
Clerk, United States Court of Appeals
for the Third Circuit

Costs taxed in favor of appellee as follows:

Brief — $294.00

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT

NOT FOR PUBLICATION A76

UNITED STATES DISTRICT COURT
District of New Jersey
Newark, N.J. 07101

Chambers of
LAWRENCE A. WHIPPLE
Chief Judge

O P I N I O N

July 28, 1976

James E. Masterson, Esq.
Kleinberg, Moroney, Masterson & Schachter
225 Millburn Avenue
Millburn, New Jersey 0-041

Seymour Rudenstein, Esq.
Mellinger & Rudenstein
301 Main Street
Orange, New Jersey 07050

Re: Halpert Oberst & Co. v. Blinder,
Robinson & Company
Civil Action No. 75-363

Gentlemen:

This case was tried before the Court, sitting without a jury on July 19, 1976. At the close of defendant's case, the Court ordered all counsel to submit proposed findings of fact and conclusions of law. Decision was reserved.

The Court has had an opportunity to review the pleadings, legal memoranda, trial testimony and evidence introduced at trial. I am now prepared to decide the case.

Plaintiff, Halpert, Oberst & Co. (hereinafter "Halpert") is a New Jersey Corporation engaged in the business of selling and buying securities. Defendant, Blinder, Robinson & Company (hereinafter "Blinder") is a New York securities firm also known in the business as a dealer-trader.

This case involves the sale of 15 New York City municipal bonds. It is uncontroverted that Halpert sold these bonds to Blinder on January 15, 1975 and that Halpert has never been paid the purchase price of $15,531.68. Blinder contends that it was not acting on its own behalf when it offered to buy the bonds from Halpert. Rather, Blinder claims it was a mere agent of a firm known as Executive Securities Co. It contends further that this agency relationship was disclosed to Halpert. Blinder seeks to avoid liability on the ground that an agent cannot be held accountable for contracts executed in the name of and on behalf of a disclosed principal. Halpert, on the other hand, insists that at all times relevant to this transaction, it considered Blinder to be the purchaser and that it understood Executive to be merely Blinder's clearing agent which handled "paper work".

The crucial issue of fact to be decided by this court is whether an agency relationship which may have existed between Blinder and Executive was actually disclosed to Halpert.

I have concluded that plaintiff has proven by a fair preponderance of the evidence that defendant Blinder was the purchaser of the bonds, that plaintiff had no notice of an agency agreement between Blinder and Executive, and that even if such an agreement existed, Blinder failed to disclose this relationship to plaintiff.

FINDINGS OF FACT

On January 15, 1975, Larry Kaplan, an employee of Blinder called Stephen Golden, a bondsalesman for Halpert. Kaplan knew that Halpert was offering New York City municipal bonds that day and he telephoned to invite an offering. Golden made an offer to sell 15 bonds at $1,000 each, totaling $15,531.68. Kaplan accepted and told Golden to have them delivered to the Bank of North America for payment. At no time during this conversation did Kaplan indicate that he was acting for anyone other than his employer.

The bonds were subsequently delivered according to instructions but the bank refused to pay. Halpert eventually received new instructions to deliver the bonds to Executive Securities in Jersey City, New Jersey. Golden then caused a confirmation slip to be prepared (C-1/evid.) upon which the contra party was listed as "Executive Securities, A/C Blinder, Robinson & Co."

Golden believed that Executive was the clearing agent for Blinder. The contra party notation was intended to facilitate delivery and payment.[1]

---

1. On December 8, 1974 Golden sold New York City bonds to Halpert. Then, as in the instant case, delivery was made to the Bank of North America and delivery was refused. Golden was then instructed to re-deliver the bonds to the bank with the notation "Executive Securities, A/C Blinder, Robinson & Co." Based upon this prior transaction Golden reasonably believed that Executive was the clearing agent for Blinder.

Executive issued a check in payment of the bonds but since it lacked a second authorized signature it was not honored by the payor bank. Before a void check could be obtained, Executive became legally insolvent. Halpert has not been paid.

(Cont'd)

CONCLUSIONS OF LAW

Where a third party has no notice that an agent is acting for another, the principal is said to be undisclosed Restatement of Agency 2d, §§ 4, 322, (1958). An agent who executes a contract for an undisclosed principal becomes liable as a party to the contract. *Volkenburg, K-G v. the S.S. Henry Denny,* 295 F. 2d 330 (7th Cir. 1961); 3 AM Jur 2d, *Agency,* § 317 (1962).

In this regard it should be noted that the agent always has the duty of disclosure:

> . . . (T)he law does not impose a duty of an inquiry upon a person dealing with an agent of an undisclosed or partially disclosed principal.

Orient Mid-East Liner v. Albert E. Bowen, Inc., 458 F.2d 572, 577 (2d Cir. 1972); *2 Williston on Contract,* § 288 (3rd ed. 1959).

Thus, in a contract action the plaintiff has the initial burden of showing that the defendant was a party to it. If, at the time of contracting, the defendant did not unambiguously indicate that it was acting in a representative capacity only, the burden of going forward with such evidence shifts to the defendant. *Restatement of Agency 2d,* § 320, comment b (1958).

(Cont'd)

Even assuming arguendo that a binding agreement existed between Executive and Blinder whereby Blinder became the agent of Executive and its introduced customers, this arrangement was never made known to plaintiff.

Mr. Kaplan was not called as a witness. In fact defendant failed to call any witness who had first hand knowledge of the circumstances of the subject transaction. Golden's testimony regarding the telephone conversation stands uncontradicted. I find his testimony to be credible in all respects.

Appendix B — Opinion of the United States District Court

Applying the foregoing principles of law to the facts of this case, I find that plaintiff has established the existence of a contract for the sale of municipal bonds. Defendant has not met its burden of going forward with evidence which would rebut the presumption that Blinder was the purchaser.

Judgment shall be entered in favor of plaintiff. Plaintiff shall submit an appropriate order forthwith.

Very truly yours,

Lawrence A. Whipple
Chief Judge, U.S.D.C.

Original filed with Clerk of the Court